In this case, having regard to the shifting stances adopted by Mr. Chan when cross-examined about the two notes, I did at one stage think that perhaps his silence upon receipt of those notes might be construed as an admission of their contents. However, at the end of the day, I considered that to be fair to him, I should not so construe his silence. Accordingly, I did not treat his silence as an admission of the contents of the notes.

In these circumstances, I have no hesitation in accepting Mr. Tan's version on what I described as the crucial question in this case, namely, why did he hand the cheque for $9,900 to Mr. Chan?

But, *ex abundanti cautela,* I might as well state my findings as to the credibility of the contractor, Cheah, and the cold room manager, Khaw, respectively. I cannot see what possible reason either of these witnesses could have had for coming to Court and committing deliberate perjury to assist Mr. Tan. No reason was suggested to them in cross-examination for having done so. I was not surprised about this for, it appeared to me, that there were none. I also saw nothing improbable in their testimony. Accordingly, I had no hesitation in accepting them as witnesses of truth.

I wish to make it clear, however, that even without their testimony, I would have been prepared to accept Mr. Tan's version of the fact as sufficiently cogent to entitle him to judgment. Of course, with their testimony, the case for Mr. Tan became even stronger for reasons which are self-evident.

In the result, I had no hesitation in holding that Mr. Tan was entitled to the declarations prayed for in the Statement of Claim, with the usual consequential orders and the costs of the action. The Counterclaim was, in consequence, dismissed.

Order accordingly.

Solicitors: *Darshan Singh & Co., and Jag-Jit Singh & Co.*

RE HAJI YAHYA LAMPANG,

EX PARTE SABAH DEVELOPMENT BANK BHD.

[O.C.J. (Abu Mansor J.) June 30, 1986]

[Kota Kinabalu – Bankruptcy Petition No. 60 of 1985; Bankruptcy Notice No. 215 of 1985]

Bankruptcy – Notice – Validity of – Creditor's petition – Unsealed copy served on judgment debtor – Whether valid – Application to set aside default judgment – Petition disputed – Whether receiving order ought to be granted – Bankruptcy Act, 1969, ss. 3(1)(i) & (2), 6(4) & 131 – Bankruptcy Rules, 1969, rr. 102, 109, 117, 274 & 276 – R.H.C. 1980, O. 41, r.8 – Banking Act 1973, ss. 2 & 3 – Finance Companies Act 1969, ss. 2 & 3 – Courts of Judicature Act, 1964, ss. 7, 11 & 24.

These proceedings arose out of a guarantee executed by the judgment debtor in favour of Sabah Development Bank, who had obtained a default judgment against him. On April 19, 1985, the Bank presented a creditor's petition against him for failing to comply with the requirement of a bankruptcy notice served on him on April 9, 1985. The judgment debtor opposed the granting of a receiving order and applied to dispute the petition on several main grounds, *i.e.* (a) failure to serve a sealed copy of the petition on the judgment debtor; (b) the validity of the petition is being disputed under rule 117 of the Bankruptcy Rules, 1969; (c) the affidavit of truth annexed to the petition is not sufficient as it was sworn before an advocate of the same firm representing the petitioner; (d) the judgment debtor has applied to set aside the default judgment, and be given leave to defend, and execution be stayed, and (e) there were triable issues. The Bank opposed the judgment debtor's application.

Held: (1) the unsealed creditor's petition could not reasonably mislead the judgment debtor and therefore it was validated by section 131 of the Bankruptcy Act;

(2) the petitioning creditor was authorized to give a loan for which the judgment debtor was the guarantor;

(3) in bankruptcy matters the attestation need only comply with the Bankruptcy Rule 102 and need not comply with O.41, r.8 of the Rules of the High Court, 1980;

(4) under proviso (ii) of section 3(2) of the Bankruptcy Act, the bankruptcy notice was valid as the judgment debtor had not given notice disputing its validity;

(5) the court did not feel disposed to enquire into the default judgment;

(6) being bound by the *Tractors Malaysia*[22] case, the learned judge made the receiving order against the judgment debtor as prayed. Petition granted, with liberty to apply.

Cases referred to:

(1) *Re M.P.L.M. Muthiah Chettiar* [1938] M.L.J. 233.

(2) *Au Yong* v. *Dicum & Anor.* [1963] M.L.J. 349, 354.

(3) *Re A Debtor, No. 21 of 1950, Ex Parte The Debtor* v. *Bowmaker* [1951] 1 Ch. 313.

(4) *Rengasamy Pillai* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 233.
(5) *Phillips* v. *Copping* [1935] 1 K.B. 15, 21.
(6) *Bank of China* v. *Lee Kee Pin* [1961] M.L.J. 40.
(7) *Bank of China* v. *Chew Kean Kor* [1963] M.L.J. 41.
(8) *United Dominions Trust Ltd.* v. *Kirkwood* [1966] 2 Q.B. 431.
(9) *Re Bagley* [1911] 1 K.B. 317, 323, 325.
(10) *Baker* v. *Ambrose* [1896] 2 Q.B. 372.
(11) *Bourke* v. *Davis* 44 Ch. D. 110, 126.
(12) *Rengasamy Pillai* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 233.
(13) *Re O.C.S. (A Debtor)* [1904] 2 K.B. 161.
(14) *Re A Debtor 478* of 1908 [1908] 2 K.B. 684.
(15) *Re United Marine Supply Co.* [1960] M.L.J. 305.
(16) *Re Martin Lee* [1962] M.L.J. lxxi.
(17) *Re Saloma Co.; Ex Parte Ipoh Radio Co.* [1963] M.L.J. 46.
(18) *Re Lennox* (1885) 16 Q.B.D. 315.
(19) *Re Gooch* [1921] 2 K.B. 593.
(20) *Re Flatau* (1889) 22 Q.B.D. 83.
(21) *Ampthill Peerage* [1977] A.C. 547.
(22) *Reichel* v. *Magrath* (1889) 14 App. Cas. 665.
(23) *Tractors Malaysia Sdn. Bhd.* v. *Charles Au Yong* [1982] 1 M.L.J. 320.

BANKRUPTCY PETITION.

Cecil Abraham (*Alex Decena* with him) for the judgment creditors.

S. Sivasubramanian (*Ansari Abdullah Ali* and *Sugumar Balakrishnan* with him) for the judgment debtor.

Abu Bakar Awang for the Official Assignee.

Cur. Adv. Vult.

Abu Mansor J.: On April 19, 1985 the Sabah Development Bank ("the bank") presented a creditor's petition ("petition") against the judgment debtor ("judgment debtor") for failing to comply with the requirement of a bankruptcy notice served on him on April 9, 1985. The judgment debtor by notice dated September 19, 1985, opposed the making of a receiving order and applied to dispute the petition. The judgment debtor's application was supported by his affidavit sworn on September 19, 1985. It was based on the following grounds:

(a) the petitioners failed to serve a sealed copy of the petition on judgment debtor. He was served instead with an unsealed copy of the petition;

(b) that judgment debtor has filed a notice disputing the validity of the petition under Rule 117 of the Bankruptcy Rules 1969;

(c) that the affidavit of truth ("affidavit") of Francis Lu Chea Fatt dated April 19, 1985 annexed to the petition is not sufficient under O.41, Rules of High Court, 1980, as it was sworn before an advocate of the same firm representing the petitioner.

It is also opposed on the ground that the judgment debtor has filed through his solicitors an application by way of a summons-in-chambers dated September 11, 1985, for an order that the judgment entered in default of defence dated May 8, 1984 (in Civil Suit No. K.385 of 1983), be set aside, that he be at liberty to defend by filing a defence within 21 days from the date of that order and the execution of that judgment be stayed. Judgment debtor also further contended that there are triable and arguable issues disclosed in the affidavit annexed thereto as regards judgment debtor's liability in Civil Suit No. K.385 of 1983 filed therein.

Mr. Sivasubramaniam for the judgment debtor submitted that since a receiving order affects the status of his client who holds certain political posts such as State Assembly Member for Tempasuk and M.P. for Kota Belud, he urged on the court to see that the requirement of the Bankruptcy Rules be strictly observed and followed. Unless the court is so satisfied, the petition should be dismissed.

He complained that his client filed the notice to oppose the petition on September 19, 1985. A requirement of section 5 of the Bankruptcy Act 1914 was for the judgment creditor to file another affidavit to verify the debt. Although the hearing of this matter came up on September 27, 1985, no effort was made to verify although enclosure (5) was filed by the petitioner. He cited *Williams* on Bankruptcy, 17th Edn., page 23.

On the first ground that the bankruptcy petition was not sealed, judgment debtor's counsel pointed out that it is required to be so by Rule 109 of the Bankruptcy Rules ("Bankruptcy Rules") providing for a sealed copy of the petition to be served. It is not disputed that the bankruptcy petition HYL-1 of enclosure (4) served on the judgment debtor was not sealed. Counsel submitted that since the bankruptcy petition served was not sealed no receiving order be made

against the judgment debtor and there is no excuse for judgment creditor for not having done so. In support he cited two authorities. One was *Re M.P.L.M. Muthiah Chettiar*[1] where it was held that a bankruptcy notice was bad because it was not properly sealed with the court's seal and the omission was not a mere formality. Bankruptcy Rule 93 on which the decision was based is *in pari materia* with the present Rules except that part regarding the service on Official Assignee. The other authority was the dissenting judgment of Neal J. in *Au Yong* v. *Dicum & Anor.*[2] who held that the serving of an unsealed bankruptcy notice could not be described as a formal defect or irregularity which can be cured.

Mr. Cecil Abraham for the judgment creditor, however, submitted that this irregularity was not fatal but curable by virtue of Rule 274 of the Bankruptcy Rules 1969 and by the substantive provision of section 131 of the Bankruptcy Act that no bankruptcy proceedings should be invalidated by any formal defect or irregularity unless the court is of the opinion that substantial injustice has been caused by such and the injustice could not be remedied by any order of that court. Counsel further submitted that *Re Au Yong (supra)* would be binding on this court as it had discussed *Re Muthiah (supra)* and the latter is only of persuasive authority and the judge did not even address himself whether the defect was curable.

He further submitted that the proper test to be applied by the court is whether the defect is of such a nature which could mislead the debtor. In support he cited the case of *Re A Debtor, No. 21 of 1950, Ex Parte The Debtor* v. *Bowmaker*[3] where Harman J. said the test should be not that the bankruptcy notice has misled the debtor but whether it could mislead him. In that case it was not an irregularity which could be overlooked where the judgment notice could have originated either from Redhill Court or the Windsor Court. Counsel said the principle was applied again by the Privy Council in *Rengasamy Pillai* v. *Comptroller of Income Tax*[4] where the Privy Council held that the bankruptcy notice though defective was curable by section 131 of the Bankruptcy Ordinance 1959. Counsel urged the court to apply the above authorities especially *Rengasamy's case* as there was no suggestion in the affidavit that the judgment debtor was misled.

What had to be determined by this court was whether the unsealed creditors' petition HLY-1, enclosure (4), could mislead the judgment debtor. After considering *Re Au Yong (supra),* and the case of *Rengasamy* v. *Comptroller of Income Tax (supra)* and their combined effect I hold that this unsealed creditors' petition, HLY-1, could not reasonably mislead the judgment debtor and therefore it was validated by section 131 of the Bankruptcy Act. I do so after examining the details of what is stated in HLY-1. It was clear as to who presented the petition, the amount of the debt, the judgment of which court and how the debt arose and it did specify the particular act of bankruptcy the petition referred to. These facts were further enforced by the fact that the bankruptcy notice was personally served on the judgment debtor by the clerk of the judgment creditors' solicitors according to enclosure (7). The judgment debtor was represented by a solicitor and he, being a man of considerable standing, a Member of Parliament and a Member of the Sabah Legislative Assembly, as was said in *Re Au Yong (supra),* could easily set in motion an enquiry as to what the petition HLY-1 was about if he was in any doubt. I will refer later on that by conduct the judgment debtor accepted the judgment and the bankruptcy notice and was in no way misled.

In the course of his argument Mr. Sivasubramaniam, counsel for the judgment debtor, raised the point that the judgment creditor had no power to grant the loan in fact granted. He alleged that the judgment creditor is not authorised to operate as a bank not having been licensed to do so by the Minister although the Minister had allowed it to use the word "bank." Counsel for the judgment creditor objected to the counsel raising this issue of the illegality of the bank on the ground that such issue had not been made a ground of judgment debtor's objection in enclosure (4). After reserving the point for decision I allowed the argument to develop at next date following *Phillips* v. *Copping*[5] where no notice is needed to raise an illegality, if indeed the loan was an illegal loan from an unauthorised bank, and I gave due notice to the judgment creditor that I would require an argument on that point.

Mr. Sivasubramaniam argued that the loan was banking facilities granted to principal debtor, a shipping company, Perkapalan Lautan Biru, to secure mortgages of two ships and the judgment debtor acted as a guarantor.

Mr. Sivasubramaniam referred to para. 2(c) of enclosure (16), the affidavit of judgment creditor, which said they are not a bank and their operation does not come within section 2 of the Banking

Act and as such they said they had not infringed section 3 of the Banking Act. They also alleged that judgment creditor does not carry on business under the Finance Companies Act, 1969, as their business does not come within section 2 of the Finance Companies Act and their activities do not infringe the provision of section 3 thereof. Counsel contended that in the writ it is clear that judgment creditor held themselves out as a bank. He submitted that the loan to Perkapalan Lautan Biru was a loan to a "customer" within section 2 of the Banking Act and they admitted they do not have a licence under the Finance Companies Act, 1969. Judgment creditor also said they are not carrying business under the Moneylenders Ordinance. They now say that the only authority of the judgment creditor to lend is under the Memorandum and Articles of Association, para. 2(a) of enclosure (16), exhibit FLCF-1, in which none of the objects authorises the judgment creditor to operate as a bank for section 3 of the Banking Act requires a licence in addition to permission to use the word "bank.'

Mr. Cecil Abraham admitted that the judgment creditor is not a bank within the meaning of the Banking Act and repeated all those matters in affidavit, enclosure (16), that it does not conduct business under the Finance Companies Act and neither is it a licensed moneylender under the Moneylenders Ordinance, the judgment creditor having been exempted from the provision of the Moneylenders Ordinance.

He went further to argue that in fact the judgment creditor operated as a development bank. Since July 26, 1978, it had been duly authorised to use the word "bank" by the Minister under section 9 of the Banking Act and because it does not do the business of receiving any money on current and deposit accounts its operation is outside "banking business" as defined by section 2 of the Banking Act.

As to the alleged legality of this relevant transaction, counsel contended that the present judgment debtor executed the guarantee, FLCF-6, on December 10, 1982. His liability arose when a demand was made. The loans to the principal debtor, the Perkapalan Lautan Biru, in respect of the ships' mortgages were secured by a debenture dated December 6, 1982, and registered under section 108 of the Companies Act and the ships' mortgages were secured by registered charges, and all transactions were in accordance with their Memorandum and Articles of Association.

Mr. Cecil Abraham further contended that the action of the judgment creditor was to recover the money due to them and this could not be called transacting "banking business" as defined. He cited *Bank of China* v. *Lee Kee Pin*[6] and *Bank of China* v. *Chew Kean Kor.*[7] As for the characteristics of a bank petitioning creditors' counsel cited *United Dominions Trust Ltd.* v. *Kirkwood*[8] which spells out some characteristics of a banking as (1) the acceptance of money from and collection of cheques for customers and the placing of them to the customers' credit; (2) the honouring of cheques on orders drawn on the bank by their customers when presented for payment and debiting of customers accordingly; (3) the keeping of some form of current or running accounts for the entries of customers' credits and debits. Counsel submitted that on the evidence before the court, in particular enclosure (16), the petitioning creditor is not a bank and he urged on the court to make that finding in law.

After listening to arguments and considering the evidence and the authorities I am satisfied and I accept the affidavit of the General Manager of the petitioning creditors (16) that the activities of the petitioning creditors in respect of this transaction neither infringed section 3 of the Banking Act as they do not come within section 2 of that Act nor do they contravene section 3 of the Finance Companies Act, 1969, since their activities do not come within section 2 thereof. Since the petitioning creditors had been exempted by gazette notification PU(B)176 of 1986 from the provisions of the Moneylenders Ordinance with retrospective effect from August 9, 1977, this relevant transaction also did not infringe that Ordinance. I am therefore satisfied that the petitioning creditor, a corporate body, was authorised by its Memorandum and Articles of Association to give a loan and they protected themselves by receiving the mortgages and debentures. The petitioning creditors' contract with the judgment debtor was to guarantee the repayment of legal loan to Perkapalan Lautan Biru. The action instituted against the judgment debtor as guarantor was an action to recover that amount based on the judgment debtor's contractual obligation as such.

The next ground raised by the judgment debtor in opposing this application, enclosure (4), was that the affidavit of truth of the statement, enclosure (1), was affirmed before Mr. John Kah, a member of the firm representing the petitioning creditors and therefore, judgment debtor alleged, the petitioning creditors infringed the provisions of

O.41, r.8, High Court Rules, 1980. Counsel cited in *Re Bagley*[9] where it was held that although under the first part of subsection (3) of the Commissioners Act, 1889, a solicitor is empowered to administer an oath yet there is a proviso that this general power may not be exercised by any person who is solicitor to any of the parties in any proceedings. This was following *Baker* v. *Ambrose.*[10] Counsel also cited the case of *Bourke* v. *Davis.*[11] He also cited *English and Empire Digest, Vol. 22,* pages 609 and 610, paragraph 6361 and paragraph 6384 which in effect held that affidavit sworn before a Master who is the clerk of the plaintiff's attorney was rejected, the reason being the court required an independent Commissioner. Counsel traced the position in Malaya as to this provision. The same provision was found in the proviso to section 4 of Commissioners for Oaths Ordinance (No. 9 of 1962) (Borneo). It was repealed by Federal *Gazette* PU 121 of 1968. After the repeal the position would appear to be what is provided by section 11 of the Judicature Act, 1964. Nothing was provided for on this point in either the Judicature Act or the Commissioner for Oaths Rules until the High Court Rules 1980, O.41, r.8, came into being. Counsel urged on the court to apply the case of *Bourke* v. *Davis (supra).* For the judgment creditor it was submitted that non-compliance with O.41, r.8 High Court Rules is not fatal. O.1, r.2(2) of the High Court Rules states the High Court Rules shall not have effect in relation to proceedings in respect of which rules have been made under any written law for the specific purpose of such proceedings. Judgment creditors' counsel says rules have in fact been made for this purpose – the Bankruptcy Rules 1969 and rule 276 of the Bankruptcy Rules provides "save as provided by these rules, the Rules of the Supreme Court regulating the procedure in its civil jurisdiction shall not apply to any proceeding in bankruptcy." He contended that O.41, r.8, of the High Court Rules only makes provisions generally on affidavit and has no application to bankruptcy proceedings. The relevant provision as to attestation has been provided under heading "Attestation," rule 102, Bankruptcy Rules, which if attested in the Federation must be attested by a solicitor or others named. Counsel urged on the court to disregard the cases such as *Re Bagley (supra)* and *Bourke* v. *Davis (supra)* as those decisions were not on bankruptcy cases but bear on O.41, r.8, proper.

The court found Mr. Sivasubramaniam's argument was not without its attraction and it found itself in considerable difficulty to make a decision on the point raised. In *Rengasamy Pillai* v. *Comptroller of Income Tax*[12] the Privy Council, when it was contended by the appellant there that the bankruptcy notice did not comply with the requirements of section 7(1) of the Courts of Judicature Act, 1964, in that it was not expressed to be issued by the Chief Justice in the name of the Yang Di-Pertuan Agong but "by this court," and therefore a nullity, held there was a conflict between the provisions of the Bankruptcy Act and section 7 of the Judicature Act on the issue and form of the bankruptcy notice. Their Lordships went on to say that in their view it was not possible to construe the general words of section 7 of the Judicature Act as to exclude documents issued by the High Court in the exercise of any jurisdiction which is expressly conferred upon it by Chapter 11 of the same Act. They say section 24(c) of the Judicature Act refers to the High Court's "jurisdiction under any written law relating to bankruptcy" was clear indication that the legislation intended the subject matter of the Courts of Judicature Act, 1964, to include *inter alia* the special jurisdiction of the High Court in bankruptcy. *Prima facie* therefore their Lordships held that the rule of construction expressed in the maxim *generalia specialibus non derogant* is not applicable so as to enable them to construe general words in the Act which are apt in their ordinary meaning to relate to the process of a High Court in the exercise of its bankruptcy jurisdiction as intended to exclude such process. Moreover, his Lordship held the terms of section 7 of the Act supports that view.

Is the position so in our present case? It is admitted that under the provision of O.41, r.8, of the High Court Rules, 1980, no affidavit is sufficient if sworn by a person before the solicitor representing that party or before any member of the firm of that solicitor whereas under Rule 102 of the Bankruptcy Rules attestation before a solicitor is sufficient. There is then an apparent conflict. When the High Court Rules were made in 1980 there was in existence then the present Bankruptcy Rules which were made in 1969. Rule 276 of that Bankruptcy Rules provides "save as provided by these Rules the Rules of the Supreme Court regulating the procedure in its civil jurisdiction shall not apply to any proceedings in bankruptcy." Then O.1, r.2(2), of the High Court Rules, 1980, provide: "These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings..." and the High Court Rules were made

pursuant to section 17 of the Courts of Judicature Act, 1964. I am of the view and I find that when the High Court Rules, 1980, were enacted there was a clear intention by the drafters thereof to exclude the rules made under the specific purpose of bankruptcy. I therefore rule that in bankruptcy matters in order that the attestation to be valid it need only comply with the Bankruptcy Rule 102 and need not comply with O.41, r.8, High Court Rules.

Another ground put forward by the judgment debtor was that the sum due under the bankruptcy is not due. In para. 5 of affidavit attached to enclosure (4), judgment debtor states there are arguable and triable issues in the affidavit in support of his application filed on September 11, 1985 seeking for an order that the judgment in default of defence entered on May 8, 1984 be set aside, that he be at liberty to file a statement of defence and that the execution of the judgment therein be stayed.

The judgment debtor contended that in a bankruptcy notice the exact sum due must be stated in the bankruptcy notice or petition. In the present case the amount of $200,000/– in the judgment creditors' possession after deducting the amount of M$294,535.41 expended in the ships' management or maintenance had not been given credit for and instead the amount stated in the bankruptcy notice and bankruptcy petition was the same amount as the one in the default judgment. Counsel cited *Re O.C.S. (A Debtor),*[13] *Re A Debtor 478 of 1908,*[14] *Re United Marine Supply Co.,*[15] *Re Martin Lee*[16] and *Saloma Co., Ex Parte Ipoh Radio Co.*[17] all of which basically say that the figure in the bankruptcy notice and the creditors' petition must state the figures that are due else the defect is fatal and in no way can be be cured.

For the judgment creditor it was submitted that the court ought to disregard these cases as, he says they were not relevant to the issue. At a later stage of his argument counsel also stated that it is too late for the judgment debtor to raise this objection now. He contended that the judgment debtor should have applied to set aside the bankruptcy notice and applied for a stay under section 6(4) of the Bankruptcy Act.

In answer to the point raised that the amount stated has to be correct, judgment creditors' counsel referred the court to the affidavit of Francis Lu Chea Fatt, enclosure (16), who deposed that the two vessels concerned were sold and the proceeds were deposited with the judgment creditors' solicitors to meet priorities as set out in page 7 of enclosure (16). The judgment creditors' claim for the amount of $2,910,088.80 would rank fifth after discharging the Sheriff's commission and plaintiff's costs and expenses of arrest of the two vessels which came to M$650,815.21. The deponent says it is clear that the proceeds of sale would be exhausted by prior claims and judgment creditors as mortgagees would not recover anything. Counsel for the judgment debtor asked the court to note however that under plaintiff's costs and expenses of arrest (e) plaintiff's legal costs and disbursements is M$229,619.34 whereas the court in its order FLCS-5 allowed only $225.10 and if proper accounts had been taken of this item it would not hold.

I considered the authorities. I agree with the petitioner's counsel that those cases cited by the judgment debtor's counsel should be ignored. The cases cited all related to decision where the judgment debtors were entitled to credits and they were not so given in the bankruptcy notice. As stated in page 7, enclosure (16), there was no credit to be given to the judgment debtor after sale of the two vessels because of prior claims. Hence the petitioners' claim from the judgment debtor for the full debt. I am also of the view that the decisions as to exact amount cited by counsel for judgment debtor would not be of any effect at present in view of the proviso (ii) of section 3(2) of the Bankruptcy Act which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the stipulated time allowed for payment gives notice to the creditors that he disputes the validity of the notice on the ground of such mistake. No such notice was given by the judgment debtor in this case.

The court comes to the issue whether the court should enquire into the validity of the judgment debt. For the judgment debtor he urged the court to do so as the court has wide powers and has to be satisfied that there was a debt. He cited *Re Lennox*[18] and *Re Gooch.*[19] Counsel for judgment creditors on the other hand did not dispute that the court has power to enquire and to go behind a judgment but such power would only be exercised if there is an allegation of fraud or collusion or a miscarriage of justice. He cited *Re Flatau*[20] and the *Ampthill Peerage.*[21] Coun-

sel further contended that judgment debtor's allegation of negotiations and ulterior motive were insufficient reason for the court to embark on an enquiry into the consideration behind the judgment.

The court after considering the authorities and the circumstances leading to the "in default judgment" and the subsequent conduct of the parties after the judgment did not feel disposed to enquire into the judgment. There was no allegation of fraud, collusion or miscarriage of justice. It was a regular judgment. The judgment in default of defence was entered on May 8, 1984. The judgment debtor was represented by M/s. Ansari & Co., who had filed appearance on October 20, 1983. If as what had been stated by the judgment debtor was true that in early November 1983 the judgment creditors gave an undertaking that they would not proceed with the above suit pending a negotiated settlement the judgment debtor would have promptly applied to set aside that judgment on being informed of it. But what have we in these proceedings? It is clear from the affidavit of judgment debtor sworn on September 11, 1985, HYL-4, that he accepted the in default judgment and the judgment debtor through his counsel's letter HYL-2 dated September 12, 1984 instead of protesting of the breach of alleged undertaking tried to settle the debt by offering as collateral land title CL03529917. Judgment creditor of course sent this land title for valuation. When negotiations to settle this debt broke down and the judgment debtor could not provide sufficient collateral the judgment creditors by letter dated April 19, 1985, HYL-2, proceeded with the present application. Negotiations were after the judgment.

Judgment creditors' counsel submitted that to permit the judgment debtor to raise the issues which the judgment debtor wanted to raise and to counterclaim for rescission of the guarantee would be scandalous. He cited *Reichel* v. *Magrath*[22] which judgment had the approval of the Federal Court in *Tractors Malaysia Sdn. Bhd.* v. *Charles Au Yong*[23] and which decision following a bankruptcy petition on almost similar facts after a default judgment is binding on this court. In the *Tractors Malaysia case (supra)* the Federal Court in allowing the appeal after the setting aside of the petition by the trial judge held that the essence of the claim of respondent (judgment debtor) did not amount to a counterclaim which he could not have set up in the first action in which the judgment creditor obtained judgment within the meaning of section 3(1)(i) of the Bankruptcy Act, 1967. On the contrary the Federal Court held the judgment debtor there could have set it up if his solicitor wanted to and there was plenty of time between the default judgment and the bankruptcy notice for the judgment debtor there to set aside the judgment in default. Similarly in our present petition it is also clear that the defence and counterclaim that the judgment debtor wished to set up are not the ones which he could not have set up in the action in which the judgment in default of defence was obtained within the meaning of section 3(1)(i) of the Bankruptcy Act, 1967. He was represented by counsel and there was ample time for the judgment debtor to set aside the judgment. He instead through his counsel tried to settle it.

Holding myself bound by the Federal Court decision in *Tractors Malaysia case (supra)*, I cannot find any reason why I should not make the Receiving Order on the estate of the judgment debtor as prayed. I do so now. Petition is so granted with liberty to petitioner to further apply.

Order accordingly.

Solicitors: *Jayasuriya Kah & Co.; Ansari Datu Nasrun & Co.*

THE GOVERNORS & TRUSTEES OF LADY TEMPLER TUBERCULOSIS HOSPITAL FUND REGISTERED v. RAMPAI MUDA DEVELOPMENT SDN. BHD.

[O.C.J. (L.C. Vohrah J.) October 2, 1986]
[Kuala Lumpur – Civil Suit No. F. 22-241-1986]

Contract – Agreement for management of hospital and lease of land – Breaches by defendants – Application for interlocutory injunction and order for vacant possession – Whether should be granted – Factors to be considered – Balance of convenience.

Injunction – Application for interlocutory – Factors to be considered – Balance of convenience.

The subject matter of this case is a hospital, the Lady Templer Hospital, owned by the plaintiffs, who also owned some 51 acres of land on which the Hospital and other buildings were erected. On December 11, 1984, the plaintiffs and the defendants executed an agreement providing, on terms and conditions stated therein, for the transfer of the management of the Hospital and for the lease of the land from the plaintiffs to the defendants for the period commencing on January 1, 1985, and ending on June 18, 2057. The plaintiffs contend that as a result of the defendants committing a breach of the agreement by not paying the rental and rental deposit and by not furnishing the bank guarantee/performance bond, and consequent upon sending